

Mary K. Murphy v. U.S. General Accounting Office

Docket No. 91-05

Date of Decision: March 31, 1992

Cite as: Murphy v. GAO (3/31/92)

Before: Jessie James, Jr., Member ¹

Performance Appraisal

Evaluation of Employees

RECOMMENDED DECISION OF ADMINISTRATIVE JUDGE JESSIE JAMES, JR.

This is a proceeding brought under the General Accounting Office Personnel Act ("GAOPA"), as amended, 31 U.S.C. §731, *et seq.* (1988). Petitioner, Mary K. Murphy, has filed a Petition for Review with this Board alleging that the Respondent, U.S. General Accounting Office (GAO), committed prohibited personnel practices in administering the performance appraisal received by Petitioner in June of 1990.

Petitioner is a Band I Full Performance Evaluator and has been employed in the Cincinnati Regional Office (CINRO) since 1986. Petitioner filed her Petition for Review on April 3, 1991, alleging that the performance appraisal she received on June 13, 1990, was rendered in violation of Federal law and GAO regulations. As relief, Petitioner requested that her June 13, 1990 performance appraisal be removed from her personnel file and destroyed.

On April 29, 1991, Respondent filed its answer to the Petition for Review. Respondent generally denied having violated any law or regulation in administering Petitioner's performance appraisal. Respondent further denied that the rules cited by Petitioner were regulations with the force of law, and thus, Petitioner was unable to make a showing that a prohibited personnel practice had occurred.

The hearing in this matter was conducted by the undersigned on August 21-22, 1991. Each of the parties submitted prehearing briefs.²

Petitioner's Contentions

Petitioner contends that the performance appraisal issued to her by Respondent on June 13, 1990, was administered in violation of a law as well as regulations which implement or directly concern a merit system principle. As a result, Petitioner asserts that Respondent committed a prohibited personnel practice. Petitioner argues that her supervisors failed to communicate to her the performance standards and critical elements by which her performance would be appraised prior to the onset of her performance appraisal period. By failing to do so, Petitioner maintains that Respondent violated 5 U.S.C. §4302 as well as GAO Order 2430.1 and the Cincinnati Regional Office Staff memorandum of July 14, 1989. The statute, 5 U.S.C. §4302, and the GAO Order and CINRO Staff memorandum, which Petitioner maintains are regulations, all require that an employee's performance standards and critical elements be communicated to the employee at the onset of the appraisal period. Petitioner contends that the Respondent's failure to communicate her performance standards and critical elements (the process is referred to at GAO as

"setting expectations") in the manner required by law and regulations constitutes a prohibited personnel practice within the meaning of 5 U.S.C. §2302.

Petitioner maintains that Respondent violated an additional regulation in executing her June 13, 1990, performance appraisal. According to Petitioner, Respondent failed to properly monitor her performance and provide her feedback on her progress during the appraisal period in question, as required by the GAO Band I and Band II Employees Performance Appraisal System manual (June 1989).

Respondent's Contentions

Respondent contends that no prohibited personnel practice was committed in conjunction with Petitioner's June 13, 1990, performance appraisal. Respondent argues that Petitioner's expectations were communicated to her within thirty days of the commencement of the Bridge Needs Job, the job upon which Petitioner's performance appraisal was based, and that such communication fully complied with the requirements of 5 U.S.C. §4302 and GAO Order 2430.1. Respondent further argues that neither the Band I and Band II Employees Performance Appraisal System manual nor the CINRO Staff memorandum of July 14, 1989, are rules and regulations within the meaning of 5 U.S.C. §2302, but, even if they are, none of their provisions were violated in any way regarding the communication to Petitioner of her performance standards and critical elements. Instead, Respondent maintains that Petitioner mistakenly believed that the Bridge Needs Job began in January of 1990, when the clear evidence on the record shows that the Bridge Needs Job began in February of 1990. With respect to Petitioner's allegation that Respondent failed to properly monitor Petitioner's performance and provide her timely feedback on the progress of her work, Respondent asserts that Petitioner's supervisor consistently informed Petitioner of the deficiencies in her performance and gave her ample opportunities to improve her performance.

Issues Presented

1. Whether Respondent failed to communicate Petitioner's performance standards and critical elements (expectations) to her in advance of the performance appraisal period?
2. Whether Respondent failed to monitor Petitioner's performance and provide her feedback during the appraisal period, as required by the regulations in question?

Undisputed Facts

1. Petitioner is a Band I Full Performance Evaluator employed by GAO since 1986 in the Cincinnati Regional Office (CINRO). (Tr. 28.)
2. Petitioner returned from leave on January 8, 1990, and was assigned to the transportation issue area. (Tr. 28.)
3. The transportation issue area manager in the Cincinnati Regional Office (CINRO) was Don Heller. (Id.)
4. Petitioner's immediate supervisor on the Bridge Needs Job was Joe Christoff. (Id.)
5. At the time Petitioner was assigned to the transportation issue area, Don Heller gave her books and publications from previous transportation issue area assignments to read so that Petitioner could familiarize herself with transportation issues. (Tr. 28.)

6. For approximately six weeks, from January 8, 1990, to the end of February 1990, Petitioner's primary duties in the transportation issue area were to research available transportation literature and summarize the documents she read. (Tr. 28.)

7. Petitioner also travelled to GAO headquarters in Washington, D.C., to perform additional research during the January-February 1990 period. (Tr. 27.)

8. Petitioner and other transportation issue area staff members also travelled to Pennsylvania, North Carolina, and to Minnesota to interview transportation officials in those states and obtain further background information. (Tr.29.)

9. From January 8, 1990, to the end of February 1990, Petitioner completed a total of thirty written products for a total of 281 pages of written materials. Petitioner's written work products included 15 summaries, 14 interviews, and one write-up of a day-long job planning conference. (Tr. 29.)

10. "Setting expectations" is the term used by Respondent for the process by which performance standards and critical elements are communicated to GAO employees in compliance with Federal statutes and GAO Regulations. (J.E. 10, Ch. 1.)

11. Expectation setting is the key element in GAO's performance appraisal system. Expectations, when set properly, should communicate to an employee what work should be done, by when, how well, and how the quality of the work will be judged. (*Id.*)

12. Expectations should be set for an employee at the beginning of the performance appraisal period. (J.E. 9; Tr. 192.)

13. The Cincinnati Regional Office Staff Memorandum dated July 14, 1989, is a clarification of the principles embodied in 5 U.S.C. §4302 and GAO Order 2430.1, as they apply to the CINRO. (P.E. 7.)

14. The laws and regulations relevant to Performance Appraisal also require that employees be given feedback about their performance during the appraisal period. (J.E. 9; J.E. 10.)

15. The person responsible for setting Petitioner's expectations was Joe Christoff, Petitioner's immediate supervisor. (Tr. 28.)

16. Christoff set Petitioner's expectations on March 22, 1990. (J.E. 4.)

17. GAO Order 2430.1 and the CINRO Staff memorandum of July 14, 1989, clearly state that an employee's expectations must be set no later than 30 days after the beginning of a new assignment. (J.E. 9; P.E. 7.)

Analysis

The gravamen of Petitioner's claim is that Respondent failed to communicate her performance standards and critical elements to her at the beginning of the performance appraisal period, and that, further, Respondent failed to provide her with feedback or counseling adequate to put her on notice that her performance was deficient in any of her critical elements. Petitioner claims that all of the work she performed in January and February 1990 was part of the Bridge Needs Job, and that, since her expectations were not set until March 22, 1990, Respondent was more than six weeks late in setting her

expectations, in violation of 5 U.S.C. §4302 and GAO regulations (Order 2430.1; CINRO Memorandum July 14, 1989).

It is clear that if Petitioner is correct that she started the Bridge Needs Job on January 8, 1990, rather than in late February, as Respondent contends, Respondent has clearly committed a prohibited personnel practice by failing to timely communicate Petitioner's expectations. See, Lovshin v. Department of Navy, 767 F. 2d 826, 833 (Fed Cir. 1985). The evidence of record, however, does not sustain Petitioner's contentions. While the evidence shows that Petitioner was assigned to the transportation issue area on January 8, 1990, the Bridge Needs Job did not start until February 1990. Don Heller, the transportation issue area manager for the CINRO, testified that he knew that Congress wanted a study done on transportation, especially bridges, and he gave Petitioner the initial research assignment to give her the necessary background for the job that was about to begin. Petitioner testified that she had no previous experience of any kind in the transportation issue area. (Tr. 28.) Also, the evidence shows that, at the time Petitioner was assigned to the transportation issue area, Respondent was uncertain about the scope and focus of the Bridge Needs Job. (Tr. 117.) This finding is supported by Respondent's Exhibit 2, which shows that on January 9, 1990, the United States Senate Committee on Environment and Public Works requested Respondent to review the United States Department of Transportation's current methods for estimating national bridge needs and for setting priorities for the nation's problem bridges. Respondent was instructed by the Senate Committee to determine how the United States Department of Transportation's current estimates could be improved to provide Congress more meaningful information on the use of Federal resources to achieve maximum benefits. According to Respondent, the Committee's request was very broad and it required further refinement and clarification.³ (Tr. 195-196, 310, 311.) To obtain the necessary clarification, Respondent engaged in discussions and meetings with members of the Senate Committee and its staff members. (Tr. 310. See also, Joint Exhibit 28, Memorandum dated February 13, 1990, "For Congressional Contact Files.") The meetings and discussions led to establishment of the Bridge Needs Job on February 19, 1990. (See Respondent's Exhibits 1 and 2.) It was on this date that Petitioner was assigned to the Bridge Needs Job. (Respondent's Exhibit 1, p. 5-6.)

Petitioner's supervisor gave unchallenged testimony that he learned in November of 1989 that Petitioner would be assigned to him in the transportation issue area. (Tr. 303.) At the time of Petitioner's assignment, her supervisor testified that he was working on an assignment for another Assistant Director and he was unaware of what his assignment would be in the transportation issue area. (Tr. 303, 309, 310.) In late January of 1990, he came to Washington, D.C. to discuss the Bridge Needs Job with the RCED Assistant Director. (Tr. 311.) When he returned to Cincinnati he could not start the Bridge Needs Job because he had to write a justification for review. (Tr. 312, 313.) Thereafter, he prepared the job start memorandum on February 12, 1990. (Tr. 313, Respondent Exhibit 1.) Accordingly, the job code number, 342814, was assigned to the Bridge Needs Job on February 12, 1990. (Tr. 313.) This testimony of Petitioner's supervisor was credible and went un rebutted by Petitioner.

Further support for the nonexistence of the Bridge Needs Job prior to February 19, 1990, is found in the fact that prior to February 19, 1990, the Bridge Needs Job did not have a job code number.⁴ A review of Petitioner's Time and Attendance Records and the job codes to which she charged her time during the period of January and February, 1990 shows that she did not charge time to job code number 342814 until March 10, 1990. In January and February of 1990, Petitioner charged the time she worked to what she admits were administrative codes. (Tr. 48.) Clearly, the Bridge Needs Job did not exist and Petitioner did not charge time to that project during the months of January and February.

Even more important than the above evidence is Petitioner's performance appraisal. (Joint Exhibit 1.) A review of the appraisal shows that it states that it covered the period of February 20, 1990 to June 15, 1990. In addition to the Appraisal, there was confirming testimony by Petitioner's supervisor and the Cincinnati Regional Office Manager that the rating did not cover the period of January 8, 1990 through June 15, 1990, as was suggested by Petitioner.⁵

Thus, I find that, based on the evidence as discussed above, Petitioner was not formally assigned to the Bridge Needs Job until February 19, 1990, and her expectations were timely set on March 22, 1990. Respondent did not, therefore, commit a prohibited personnel practice.

Also, Respondent did provide feedback to Petitioner about her work. According to Joint Exhibit 10, "once expectations are established, supervisors must monitor performance and periodically provide feedback to subordinates on how well they are doing. Monitoring not only keeps staff members apprised of their performance, but also assists them in developing, maintaining, or improving their skills. Moreover, such activity can also positively impact assignments by indicating when employees are ready for increased assignments, by indicating when employees are ready for increased responsibility, or by identifying and correcting problems." Hence, the giving of proper feedback is equally as important as the setting of expectations. It goes without question that Petitioner's supervisor gave her feedback during the rating period. The record is replete with the comments given by Petitioner's supervisor to her about her work. The record is so replete, that even Petitioner had to admit during her testimony, that she did receive feedback, even though she characterized it as coaching and some feedback. (Tr. 322-328. See also, Respondent's Exhibit 7.)

However, the quality of the comments given to Petitioner by her supervisor were not sufficient to put a reasonable person on notice that their performance is failing. Many of the comments appear to be editorial in nature and they do not give the Petitioner clear notice of the deficiencies in her performance. Feedback should be provided often enough to allow the subordinate to know how well he or she is performing, what his or her strengths and weaknesses are, and counseling should be provided to improve performance. (Joint Exhibit 10, at p. 6.⁶) While feedback is not the sole responsibility of the supervisor, it should reinforce good performance and if expectations are not being met it should be provided early enough so that the employee will have a chance to improve his or her performance. In this case, that was not done. Petitioner was not given the kind of feedback that would put her on notice that she was in grave danger of receiving an unsatisfactory performance rating. According to her supervisor, he detected that she was confusing information, that she was not adequately balancing all the information that was received, and that she had logic problems. (Tr. 366.) However, the supervisor did not tell Petitioner that he was having these problems with her work until May 17, 1990, the time that he was about to prepare her performance appraisal. In order for feedback to serve its proper role in the performance appraisal process, performance deficiencies must first be measured against performance standards to determine if performance is actually substandard. See, Glover v. Department of Health and Human Services, 24 M.S.P.R. 636 (M.S.P.B. 1984). Then specific, timely notice of performance deficiencies and appropriate counseling to improve performance must be given in order to give proper content to performance standards. See, Depauw v. International Trade Commission, 782 F.2d 1564, 1566; (Fed. Cir.), cert. denied, 479 U.S. 815 (1986); Shuman v. Department of Treasury, 23 M.S.P.R. 620, 628-29 (M.S.P.B. 1984).

The situation is exacerbated here, because the comments made on Petitioner's written products by her supervisor did not evidence the concerns that the supervisor testified he was having with Petitioner's work. The supervisor needed to do more to highlight his concerns and eliminate any possible confusion

which Petitioner had about the quality of her work. This is especially true where the supervisor testified that as late as March, Petitioner did an excellent job on the survey audit guidelines, and that later, when he started receiving the initial interview write-ups, he had a positive sense Petitioner was doing a good job. (Tr. 365.) Petitioner was at all relevant times convinced that she was doing a good job, and it seems clear that, until the time he began to prepare Petitioner's performance appraisal, the supervisor did nothing to indicate to Petitioner that he had any serious problems with her work. Petitioner's supervisor testified that he needed to wait until late in order to isolate one document upon which he could identify Petitioner's predominant behavior during the rating period. However, if, as the supervisor testified, Petitioner's early work was very good to excellent, and if his editorial comments were to be taken at face value, the wait did not give Petitioner sufficient time to improve her performance, and the comments did not give her timely, specific feedback that would notify her of the deficiencies in her performance and the consequences of failing to improve. See, Shuman V. Department of Treasury, *supra*.

Petitioner did not have sufficient time to correct her performance and the fault appears to lie with the decision to wait to collect additional information. Quick notice of poor performance is extremely important and necessary to assist an employee in knowing where he or she stands and in receiving the opportunity to correct poor performance. An employee should not be required to wait to be placed on a performance improvement plan before learning that he or she is not meeting expectations. While the employee in this case may have received a sufficient number of feedback comments, the comments failed to provide proper notification of borderline performance.

For the reasons stated above, the performance appraisal given to Petitioner for the period of February 20, 1990 through June 15, 1990 should be removed from her personnel file and destroyed.

Jessie James, Jr.
Administrative Judge

Date: 3/31/92

Notes

1. The Administrative Judge's term as a member of the Board expired on October 1, 1991, prior to this decision being issued. Thereafter, the Board appointed him to act as Administrative Judge for the purpose of issuing this recommended decision.
2. Throughout this proceeding, Petitioner was represented by the Office of General Counsel of the Personnel Appeals Board.
3. Petitioner confirmed this testimony of Respondent when she testified that "Well when this job started in January, it didn't have any real constraints. It was the nations's deficient bridges. And that was very broad." (Tr. 43.)
4. All work assigned to employees of Respondent is assigned according to a job code number which Respondent's employees use to report their time.
5. Although requested to address the issue of the affect of the exclusion of a month and a half of Petitioner's work from her performance appraisal, Petitioner failed to show any real loss or damage to her rating as a result of the exclusion of the work she performed in January and February. Petitioner was more

surprised to learn, for the first time at the hearing, that her performance appraisal did not cover the period of January 8, 1990, to June 15, 1990. Respondent, on the other hand, offered un rebutted evidence that it could exclude the work Petitioner performed in January and February from the performance appraisal period. (Tr. 224-225.) According to the un rebutted testimony of the Regional Office Manager of the Cincinnati Regional Office, if an employee is assigned to a job less than 30 staff days, a formal written appraisal need not be prepared unless requested by the employee or the home unit, and in this case, neither made such a request. His testimony was supported by the instruction set forth in Joint Exhibit 10 at p. 16. Joint Exhibit 10 also provides that the home unit management (in this case, the Cincinnati Regional Office Manager) decides upon the appropriate appraisal period for its staff. Id.

6. See also, Depauw v. International Trade Commission, 782 F. 2d 1564 (Fed. Cir.), cert. denied, 479 U.S. 815 (1986).